Supreme Court, U. S.
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In the Supreme Court of the United States

No. 77-1715

SECRETARY OF PUBLIC WELFARE, Commonwealth of Pennsylvania, FRANK BEAL; JOHN FONG, Director of Haverford State Hospital; NICHOLAS D'ALUISIO, Director of Polk State School and Hospital; C. DUANE YOUNGBERG, Director of Pennhurst State School and Hospital, sued as representative of all others similarly situated,

Appellants

v.

INSTITUTIONALIZED JUVENILES in Pennsylvania Institutions for the mentally ill and mentally retarded, namely, KEVIN S.; RICHARD S.; JAMES PAUL M.; EDWARD B.; RAYMOND C.; WILLIAM B.; FRANCIS B.; MARIA L.; THOMAS W.; NANCY LOUISE D.; GINA S.; and GEORGE S., by their next friend and guardian ad litem, David Ferleger, individually and on behalf of all others similarly situated,

Appellees

Appeal From the Judgment of the United States District Court for the Eastern District of Pennsylvania

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	Page
Citation To Opinion Below.	1
Statement of Jurisdiction.	2
Constitutional Provisions.	3
Statutory Provisions Involved.	4
Questions Presented.	9
Statement of the Case.	10
The Questions Are Substantial.	13
Conclusion.	21
Certificate of Service.	22

TABLE OF CITATIONS

Cases:	Page
Adickes v. S. H. Kress Co., 398 U.S. 144 (1970)	15
Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), vacated and remanded *sub nom, Kremens v. Bartley*, 431 U.S. 119 (1976).	1,10, 17
Board of Curators of University of Mo. v. Horowitz, ... U.S. . . . . , 98 S. Ct. 948 (1978)	15
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).	15
Chisholm v. Georgia, 2 Dal. 419 (1793).	18
Edelman v. Jordan, 415 U.S. 651 (1974).	18
In Re Gault, 387 U.S. 1 (1966).	14

J.L. & J.R. v. Parham, 412 F. Supp. 112 (M.D. Ga. 1975), juris, noted *sub nom, Parham, et al. v. J.L. and J.R.*, No. 75-1690. . . . . 16, 21
Meyer v. Nebraska, 262 U.S. 390 (1922). 13
Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 15
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 13
Preiser v. Rodriguez, 411 U.S. 475 (1973). 19
Smith v. Organ. of Foster Families for E. & Reform, 431 U.S. 816 (1977). 15
Stanley v. Illinois, 405 U.S. 645 (1972). 14
Wisconsin v. Yoder, 406 U.S. 205 (1972). 13

Constitutional Provisions:
Amendment XI, Constitution of the United States 18
Amendment XIV, Constitution of the United States. . . . . *Passim*
Statutory Provisions:
Mental Health Procedures Act (Act of July 9, 1976, 160th Regular Sess., P.L. 143), 50 Pa. Stat. Ann. § 7101 *et seq.*. . . . . *Passim*
50 Pa. Stat. Ann. § 7201. 6
50 Pa. Stat. Ann. § 7205. 6
50 Pa. Stat. Ann. § 7206. . . . . 7, 19
Mental Health and Mental Retardation Act of 1966 (Act of Oct. 20, 1966, Special Sess. No. 3, P.L. 96), 50 Pa. Stat. Ann. § 4101 *et seq.*. . . . . *Passim*
50 Pa. Stat. Ann. § 4402. 4
50 Pa. Stat. Ann. § 4403. . . . . 5, 6
50 Pa. Stat. Ann. § 4426. 19
28 U.S.C. Section 1253. 2

CITATION TO OPINIONS BELOW

The District Court's original decision in this case is reported at 402 F. Supp. 1039. On appeal, this Court vacated that opinion and remanded the case for further consideration *sub nom Kremens v. Bartley*, 431 U.S. 119 (1976). On remand, the lower court's decision and order, which are yet unreported, were issued on May 25, 1978 (Page 50a and page 84a).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1253 in that this appeal is taken from an order granting a permanent injunction in a civil action required to be tried by a district court of three judges.* The final decision and order of the District Court were entered on May 25, 1978. This appeal was taken on May 26, 1978.

*This action was commenced on November 16, 1973, prior to the passage of P.L. 94-381 which significantly altered the requirements for convening a three-judge court.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the Constitution of the United States, in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

The Pennsylvania Mental Health and Mental Retardation Act of 1966, section 402 (Act of Oct. 20, 1966, Special Sess. No. 3, P.L. 96, art. IV, §402) is set forth as follows:

"(a) Application for voluntary admission to a facility for examination, treatment and care may be made by:

(1) Any person over eighteen years of age.

(2) A parent, guardian or individual standing in loco parentis to the person to be admitted, if such person is eighteen years of age or younger.

(b) When an application is made, the director of the facility shall cause an examination to be made. If it is determined that the person named in the application is in need of care or observation, he may be admitted.

(c) Except where application for admission has been made under the provisions of section 402(a) (2) and the person admitted is still eighteen years of age or younger, any person voluntarily admitted shall be free to withdraw at any time. Where application has been made under the provisions of section 402(a) (2), only the applicant or his successor shall be free to withdraw the admitted person so long as the admitted person is eighteen years of age or younger.

(d) Each admission under the provisions of this section, shall be reviewed at least annually by a committee, appointed by the director from the professional staff of the facility wherein the person is admitted, to determine whether continued care is necessary. Said committee shall make written recommendations to the director which shall be filed at the facility and be open to inspection and review by the department and

such other persons as the secretary by regulation may permit.

Where the admission is under the provisions of 402(a) (2), the person admitted shall be informed at least each sixty days of the voluntary nature of his status at the facility."

The Pennsylvania Mental Health and Mental Retardation Act of 1966, section 403 (Act of Oct. 20, 1966, Special Sess. No. 3, P.L. 96, art. IV, §403) is set forth as follows:

"(a) Application for voluntary commitment to a facility for examination, treatment and care may be made by:

(1) Any person over eighteen years of age.

(2) A parent, guardian or individual standing in loco parentis to the person to be admitted, if such person is eighteen years of age or younger.

(b) The application shall be in writing, signed by the applicant in the presence of at least one witness. When an application is made, the director of the facility shall cause an examination to be made. If it is determined that the person named in the application is in need of care or observation, he shall be committed for a period not to exceed thirty days. Successive applications for continued voluntary commitment may be made for successive periods not to exceed thirty days each, so long as care or observation is necessary.

(c) No person voluntarily committed shall be detained for more than ten days after he has given written notice to the directors of his intention or desire to leave the facility, or after the applicant or his successor has given notice of intention or desire to remove the detained person.

(d) Each commitment under the provisions of this section shall be reviewed at least annually by a committee, appointed by the director from the

professional staff of the facility wherein the person is cared for, to determine whether continued care and commitment is necessary. Said committee shall make written recommendations to the director which shall be filed at the facility and be open to inspection and review by the department and such other persons as the secretary by regulation shall permit.

Where the commitment is under the provisions of section 403(a) (2), the person committed shall be informed at least each sixty days of the voluntary nature of his status at the facility.

The Mental Health Procedures Act, sections 201, 205 and 206 (Act of July 9, 1976, 160th Regular Sess., P.L. 143, art. II § 201, 205, and 206 are set forth as follows:

Section 201. Persons Who May Authorize Voluntary Treatment.

Any person 14 years of age or over who believes that he is in need of treatment and substantially understands the nature of voluntary commitment may submit himself to examination and treatment under this act, provided that the decision to do so is made voluntarily in loco parentis to a child less than 14 years of age may subject such child to examination and treatment under this act, and in so doing shall be deemed to be acting for the child. Except as otherwise authorized in this act, all of the provisions of this act governing examination and treatment shall apply.

Section 205. Physical Examination and Formulation of Individualized Treatment Plan.

Upon acceptance of a person for voluntary examination and treatment he shall be given a physical examination. Within 72 hours after acceptance of a person an individualized treatment

plan shall be formulated by a treatment team. The person shall be advised of the treatment plan, which shall become a part of his record. The treatment plan shall state whether inpatient treatment is considered necessary, and what restraints or restrictions, if any, will be administered, and shall set forth the bases for such conclusions.

Section 206. Withdrawal from Voluntary Inpatient Treatment.

(a) A person in voluntary inpatient treatment may withdraw at any time by giving written notice unless, as stated in section 203, he has agreed in writing at the time of his admission that his release can be delayed following such notice for a period to be specified in the agreement, provided that such period shall not exceed 72 hours.

(b) If the person is under the age of 14, his parent, legal guardian, or person standing in loco parentis may affect his release. If any responsible party believes that it would be in the best interest of a person under 14 years of age in voluntary treatment to be withdrawn therefrom or afforded treatment constituting a less restrictive alternative, such party may file a petition in the Juvenile Division of the court of common pleas for the county in which the person under 14 years of age resides, requesting a withdrawal from or modification of treatment. The court shall promptly appoint an attorney for such minor person and schedule a hearing to determine what inpatient treatment, if any, is in the minor's best interest. The hearing shall be held within ten days of receipt of the petition, unless continued upon the request of the attorney for such minor. The hearing shall be conducted in accordance with the rules governing other Juvenile Court proceedings.

(c) Nothing in this act shall be construed

to require a facility to continue inpatient treatment where the director of the facility determines such treatment is not medically indicated. Any dispute between a facility and a county administrator as to the medical necessity for voluntary inpatient treatment of a person shall be decided by the Commissioner of Mental Health or his designate.

QUESTIONS PRESENTED

I. Did The Lower Court Err By Concluding That Both The 1966 And 1976 Acts Violate The Due Process Clause Of The Fourteenth Amendment With Respect To The Admission Of Children To Mental Health Facilities?

II. Did The Lower Court Err In Placing The Plaintiffs And Defendants In Single Classes?

III. Are The Retroactive Aspects Of The Injunctive Relief Granted By The Lower Court Improper?

STATEMENT OF THE CASE

On November 16, 1972, the plaintiffs, juveniles under the age eighteen, instituted this action challenging the constitutionality of several Pennsylvania statutes which allowed parents to voluntarily obtain medically necessary inpatient mental health and retardation services for their children.[1] The thrust of their complaint was that the statutory and regulatory procedures for the admission of children to mental health and retardation facilities violated the Due Process requirements of the Constitution because they did not require prior notice and hearing at which the child could contest this parental decision. After a trial on the merits of these claims, the District Court ruled in favor of the plaintiffs and enjoined the enforcement of those statutes. *Bartley v. Kremens*, 402 F. Supp. 1039 (E.D. Pa. 1975).

An appeal was taken to this Court. However, while that appeal was pending the Pennsylvania Legislature enacted the Mental Health Procedures Act[2] which repealed the challenged statutes only insofar as they applied to mentally ill children. After oral argument this Court vacated the District Court's opinion and remanded the case for further consideration in light of the changed circumstances occasioned by this new legislation. *Kremens v. Bartley*, 431 U.S. 119 (1976).

On remand the plaintiffs amended and supplemented their complaint adding representative plaintiffs, and a

[1]The plaintiffs were specifically challenging the voluntary admission procedures contained in the Mental Health and Mental Retardation Act of 1966, 50 Pa. Stat. Ann. § 402 (a) (2); § 402(c); and § 403(a) (2). These statutes are set forth in the appendix to this Jurisdictional Statement and will be referred to as the "1966 Act." (a-).

[2]50 Pa. Stat. Ann. § 7101 et seq. (hereafter referred to as the "1976 Act").

class of defendants[3] However, they did not alter the theory of their claim, premising their challenge to both the 1966 and 1976 Acts on the Due Process Clause of the Fourteenth Amendment.

On May 25, 1978, the District Court entered its decision and final order once again declaring the challenged statutes unconstitutional, and enjoining their enforcement. Specifically, the Court ordered that every child admitted by his parents to a mental health facility, whether public or private, be provided two separate adversary hearings commencing no later than three days after the admission. The first hearing is for the purpose of determining the existence of ". . .probable cause to believe institutionalization is necessary", and the second is to be ". . .a full hearing on the need for commitment" (page 84a). In addition to these hearings, the children are provided the rights of prior notice, free counsel,[4] as well as confrontation and cross-examination of adverse witnesses. Finally, the lower court ordered that all children presently receiving treatment in any of the hun-

[3] The plaintiff classes have been defined as:

> (a) all juveniles committed as mentally ill to mental health facilities in Pennsylvania who are under the age of fourteen;
>
> (b) all juveniles committed as mentally retarded to mental health facilities in Pennsylvania who are age eighteen or younger. (page 84a)

The district court also certified a defendant class composed of:

> The directors of all mental health and mental retardation facilities in Pennsylvania which are subject to regulation by the defendant Secretary of Public Welfare (page 85a).

[4]The Order refers to a "trained representative" as an acceptable alternative to counsel however in the context of all of the mandatory formalities of the hearings established by the District Court, it is difficult to imagine how a non-lawyer could effectuate and protect all of the rights provided to the children.

dreds of facilities in Pennsylvania either be discharged or readmitted pursuant to those procedures within one hundred and eighty days. Shortly after the District Court's Order was entered this appeal was initiated seeking review of both the declaratory and injunctive aspects of the order.

THE QUESTIONS ARE SUBSTANTIAL

I. DID THE LOWER COURT ERR BY CONCLUDING THAT BOTH THE 1966 AND 1976 ACTS VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WITH RESPECT TO THE ADMISSION OF CHILDREN TO MENTAL HEALTH FACILITIES?

A. *Liberty Interest:*

Pennsylvania, like most other states, allows parents to seek medically recommended inpatient mental health or retardation services for their children without suffering the intrusion and trauma of adversarial proceedings. Pennsylvania's recognition of these parental prerogatives finds strong and conclusive support in the decisions of this Court. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); and *Meyer v. Nebraska*, 262 U.S. 390 (1922), this court has been steadfast in its refusal to permit governmental intrusions into the private realm traditionally reserved to the family. Thus, the court noted in *Stanley v. Illinois* that:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), 'basic civil rights of man,' *Skinner v. Oklahoma*, 316 U.S. 535, 541, (1942), and '[r]ights far more precious. . .than property rights,' *May v. Anderson*, 345 U.S. 523, 533 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth

Amendment, *Meyer v. Nebraska,* supra, at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma,* supra, at 541, and the Ninth Amendment, *Griswold v. Connecticut,* 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

Stanley v. Illinois, 405 U.S. 645 (1972) at 651.

Nevertheless, the district court ignored these precedents and erroneously concluded that the plaintiff children possessed a sufficient liberty interest to implicate the Fourteenth Amendment. This conclusion was bottomed on a line of cases reflected in *In Re Gault,* 387 U.S. 1 (1966) which dealt with the peculiar problems of the juvenile justice system. These decisions have no application here however, because this simply is not a situation where the state is attempting to impose criminal sanctions on the child for violations of law. To the contrary, this case presents a conflict between the wishes of the child and those of his parents and physicians. Viewed in its proper light, the lower court's finding that the plaintiffs possessed a protectable liberty interest in this case runs afoul of generations of precedents in this Court. In short the district court found a liberty interest where none exists.

B. *State Action:*

The mere fact that state law outlines the procedures for admission to a mental health facility, notwithstanding that the state may, in a particular situation, do no more than "approve" the facility, was apparently enough for the lower court to find "state action" sufficient to implicate the Fourteenth Amendment (page 68a and page 69a). In Pennsylvania the role of the state in the admission process varies, ranging from actually initiating the admission, to doing nothing more than licensing the facility.[5]

---

[5] The record indicates that only 10% of the children in state facilities were admitted by state agencies.

This Court has pointed to several earmarks of "state action", none of which exist in most, if not all, of the circumstances present in this case. *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972); *Adickes v. S. H. Kress Co.,* 398 U.S. 144 (1970); *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961). It is clear from these cases that the mere "approval" of a facility to provide a service to the public, without more, does not begin to approach the level of activity required to find "state action". Nevertheless the lower court ignored all the variations in the level of state involvement in the admission process from one facility to the next, and concluded there was sufficient state action across the board. This conclusion was certainly erroneous and should be reversed.

C. *The Process Due:*

After finding that the plaintiffs possessed a liberty interest which was adversly affected by actions of the defendant officials, the court concluded that the existing statutory procedures were constitutionally deficient (page 75a). In place of the statutory procedures, the court detailed a procedure for admissions that includes the rights to, not one, but two adversary proceedings, free representation, presentation of evidence, and confrontation and cross-examination.

The actions of the district court in this respect warrant reversal for two reasons. First, the court failed to recognize that under the tests established by this Court, the current Pennsylvania procedures for the admission of juveniles adequately balance *all* of the competing interests, including those of the child. *Bd. of Curators of University of Mo. v. Horowitz,*.....U.S. ....., 98 S. Ct. 948 (1978); *Smith v. Organ. of Foster Families For E. & Reform,* 431 U.S. 816 (1977). Secondly the procedures ordered by the lower court provide no greater measure of protection to the child's interests than is presently afforded by the statutes and regulations.

Thus, whatever the validity of the court's reasoning, there is no doubt that its order must be vacated.

The relief provided by the district court rests on several fundamental and erroneous assumptions. First, and without any real evidence indicating such to be the case, the court assumed that diagnoses in the mental health area were unusually prone to error (page 74a). Compounding this error, the court ordered that every diagnosis and treatment plan be scrutinized much the same as the guilt of an accused is determined. The questionable value of such proceedings in the mental health field has been aptly noted by courts and scholars alike. Similarly, the court erroneously assumed that parents possess an inherent conflict of interest with their children when, upon medical recommendation, they seek this type of health care for their children. Once again the error is exacerbated by establishing a series of procedures which are guaranteed to produce conflict and trauma within the family. Thus, even assuming the existence of the due process deficiencies detected by the lower court, the relief ordered falls far short of its mark and should be vacated.

The question raised by this appeal are extremely important and fraught with difficulties. In fact, there is presently a case listed for reargument before this Court raising similar issues. *Parham, et al. v. J.L. and J.R.*, No. 75-1690. While the *Parham* case raises similar issues as those presented in this appeal, there are differences which necessitate the review of both decisions by this Court. For example in *Parham* only mentally ill children were involved, while in this case both the mentally ill and the mentally retarded are concerned. In addition, the lower court in this case specifically included private facilities within the ambit of its ruling, while only public facilities are apparently involved in *Parham. J.L. & J.R. v. Parham*, 412 F. Supp. 112 (M.D.Ga. 1975). Finally, the statutory schemes involved differ significantly. Thus in

Pennsylvania specific substantive and procedural rights have been afforded juveniles which are absent in the Georgia statutes. See e.g. 6 Pa. Bull. No. 38, Sept. 4, 1976 at 2119 (patient bill of rights). For all of the foregoing reasons it is therefore respectfully urged that this case again warrants review by this Court. And for the reason already highlighted, as well as those that follow, the lower court's ruling must be reversed.

II. DID THE LOWER COURT ERR IN PLACING THE PLAINTIFFS AND DEFENDANTS IN SINGLE CLASSES?

This Court noted an ". . .obvious lack of homogeneity" in the plaintiff class in the original appeal in this matter. *Kremens v. Bartley*, 431 U.S. 119, 130 (1976). After reviewing but a few of the observable differences in the plaintiff class, this Court concluded that ". . .we have the gravest doubts whether the class, as presently constituted, comports with the requirements of Fed. Rule Civ. Proc. 23(a)." *Id.* at 132. Consistent with those doubts, the district court was urged to "stop, look, and listen" before certifying a class. It was urged to consider the 1973 regulations, the overall distinctions between the young and the very young, as well as between the mentally ill and mentally retarded.

Notwithstanding all of this cautionary advice, the lower court concluded that none of those factors warranted a revision of the original class (page 72a). It is true that the class is defined in terms of subclasses for the mentally ill and the mentally retarded, but this is meaningless because the analysis applied, and the relief ordered make absolutely no distinctions between the two. In short, the young and very young, and the mentally ill and the retarded have once again been erroneously lumped together and given the same treatment

despite the very real differences that exist, and have been pointed out by this court. Premised upon a short sighted due process analysis the treatment given to the plaintiff class simply does not meet the requirements of Fed. Rule Civ. Proc. 23, and must accordingly be set aside.

On the basis of this flawed due process reasoning the district court this time also certified a defendant class of all directors of mental health facilities in Pennsylvania. This class is comprised of directors of public and private facilities regardless of the degree of state involvement with the facility. Similarly, the class does not distinguish between facilities that may only deal with mildly afflicted youngsters for very short term therapy, and facilities that provide long term care for the more severaly handicapped. Once again the premise for the court's action is faculty and must be set aside.

III. ARE THE RETROACTIVE ASPECTS OF THE INJUNCTIVE RELIEF GRANTED BY THE LOWER COURT IMPROPER?

A. *The Eleventh Amendment:*

The District Court's mandate that Pennsylvania provide the full panoply of due process rights retroactively to those thousands of children who, at the time of the order, were receiving inpatient care violates the Eleventh Amendment. In *Edelman v. Jordan,* 415 U.S. 651 (1974), this Court set aside a retroactive award of certain welfare benefits wrongfully withheld by state officials. This Court recognized that such awards of retroactive relief could reap havoc with a state's fiscal soundness—the primary evil targeted by the framers of that amendment. See e.g. *Chisholm v. Georgia,* 2 Dal. 419 (1793).

In this case the retroactive relief has the critical

indicia of an illegal award that were noted in *Edelman.* Initially, the large sums of money which will be necessary to provide the thousands of hearings with appointed counsel for the child will inevitably come from Pennsylvania's general treasury, rather than from the individual defendants. Id. at 664-665. And finally, the retroactive relief in this case was not merely ancillary to, and the necessary result of ". . .compliance with [a] decree which by [its] terms was prospective in nature." Id. at 668. Thus, as the foregoing indicates, this aspect of the district court's cannot stand.

B. *Exhaustion of State Remedies:*

In Pennsylvania the right of anyone, without distinctions as to age, to seek release from custody in a mental health facility is firmly established. 50 Pa. Stat. Ann. §4426 provides that "[e] very person committed or detained in a facility by reason of the provisions of this act. . ." may avail himself of the remedy of *habeas corpus.* In addition, the 1976 Act provides that any responsible party may, with the assistance of counsel, petition the juvenile division of the court of common pleas seeking to withdraw any child from voluntary treatment. 50 Pa. Stat. Ann. §7206.

Notwithstanding the availability of *habeas corpus* and similar remedies, the plaintiffs chose to seek their release from custody by way of this civil rights action. The district court also ignored these remedies, assumed jurisdiction of the matter, and ultimately ordered the release of every child presently receiving inpatient treatment in a mental health facility (page 59a).

In all of this, the lower court and plaintiffs overlooked this Court's holding in *Preiser v. Rodriguez,* 411 U.S. 475 (1973). In *Preiser* state prisoners sought restoration of certain "good time credits" to their sentences. The effect of this claim, had they succeeded, would have been to shorten or terminate their confinement. In short,

they were charging that they were ". . .being unlawfully subjected to physical restraint. . ." Id. at 486. This Court concluded in *Preiser*, as it must here, that the exhaustion requirements of 28 U.S.C. § 2254 barred the issuance of such relief. The plaintiffs challenge in this case, as in *Preiser*, was clearly within the "core of *habeas corpus*" and therefore was improperly allowed by the district court, and should therefore be overturned by this Court.

CONCLUSION

Based upon the foregoing arguments and authorities it is requested that this Court note jurisdiction in this appeal, receive full briefs on the merits, and hear oral argument in order to resolve the substantial questions which are involved. In addition, it is respectfully suggested that this case be set down for oral argument the same day as arguments are to be scheduled in *Parham et al. v. J.L. & J.R.*, No. 75-1690.

Respectfully submitted,

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Dated: May 26, 1978

IN THE SUPREME COURT OF THE UNITED STATES

No. A—

SECRETARY OF PUBLIC WELFARE, et al.,
Appellants

v.

INSTITUTIONALIZED JUVENILES, et al.,
Appellees

CERTIFICATE OF SERVICE

I, NORMAN J. WATKINS, do hereby certify that I have served by United States Mail, postage prepaid, first class, on this date, Friday, May 26, 1978, three typed copies of Appellants' Jurisdictional Statement and Appendix to David Ferleger, Esquire, 2321 Sansom Street, Philadelphia, Pennsylvania, 19103. I further certify that all parties required to be served in this appeal have been served.

(s) NORMAN J. WATKINS
Deputy Attorney General

Dated: May 26, 1978